

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

LPDT 2020-00229-SC

BETWEEN:

**KENNETH GEORGE
GOODWIN**

Applicant

AND

**LAW SOCIETY NORTHERN
TERRITORY**

First Respondent

AND

JULIAN BARRY
Australian Legal Practitioner

Second Respondent

Coram: Julian Wade Roper (Deputy Chair)
Les McCrimmon (Legal Member)
Heather King (Lay Member)

Appearances:

Applicant: Mr. Goodwin

First Respondent: Tass Liveris

Second Respondent: David DeSilva

REASONS FOR DECISION

- 1) On 7 January 2020, the First Respondent (LSNT) dismissed a complaint by the Applicant (Goodwin) that, inter alia, his former solicitor (Barry) failed *"to dispute the second valuation report obtained by Ms Farmer or to seek additional time after the delivery of this valuation shortly before the conciliation conference."*

- 2) On 29 January 2020, Goodwin lodged an appeal with the Tribunal challenging the dismissal of the foregoing complaint.
- 3) The facts of the matter can best be distilled as set out below.
 - a) On or about 19 March 2014, Goodwin retained Barry to act on his behalf in a property division application under the *Family Law Act 1975* (the Proceedings) against Goodwin's former de-facto partner, one Kerrie Hall (Hall).
 - b) The major asset at the centre of the Proceedings was a property at Pheasant Drive, McMinnes Lagoon in the Northern Territory (the Property).
 - c) Hall wanted the Property sold and the proceeds disbursed, Goodwin wanted to purchase the property and/or orders allowing his daughter Kelly Goodwin (Kelly) to purchase the Property, given that Kelly had constructed her own residence upon it (Kelly's House).
 - d) On or about 13 November 2014, the Federal Circuit Court made directions requiring the provision of a valuation over the Property. A copy of the orders are not in evidence before the Tribunal.
 - e) On or about 12 December 2014 and ostensibly pursuant to the directions referenced at (d) above, McGee's Property provided a valuation of the Property, relevantly opining that the same had a market value of:
 - i) \$675,000.00; or
 - ii) \$450,000.00 excluding Kelly's House.
 - f) At some point in time and at least before June 2015, Kelly was joined to the Proceedings as an intervenor. The orders effecting that joinder are not in evidence before the Tribunal.
 - g) A conciliation conference was scheduled for the Proceedings at some time in March 2015. Shortly before that conference Hall's solicitor (Farmer) served a valuation report by Valuations NT, which put the market value at \$550,000.00 and made no separate provision for the value of Kelly's House.
 - h) Following the conciliation conference and on 25 March 2015, Goodwin contacted McGee's Property directly and subsequently e-mailed Barry to suggest that the valuers should conference with a view to agreeing a joint value. Barry responded by e-mail, on the same day, suggesting he had been on the cusp of making a similar recommendation.
 - i) On or about 9 June 2015, the Federal Circuit Court made orders, by consent, *inter alia*, providing that Kelly fund the experts in the preparation of further valuations and in conferencing with a view to determining whether the differences in their respective views could be reconciled.
 - j) On 6 August 2015 the valuers provided a joint expert witness statement in which McGees and Valuations NT:

- i) valued the Property without Kelly's House as having an agreed fair market value of \$465,000.00; and
- ii) agreed the value of Kelly's House at \$202,500.
- k) The valuers also agreed that the Property's value would have approximated \$500,000.00, had Kelly's House not been built upon it. Somewhat paradoxically and for reasons that are not extolled, Kelly's House appears to have both added to and detracted from the value of the Property.
- l) The relationship between Goodwin and Barry appears to have soured as a result of the valuations and on 28 August 2015, Goodwin forwarded an e-mail to Barry relevantly stating:

"I write to advise that we are seeking to find someone else to represent us. It's time to move on as we can see there is little hope of a fair resolution by remaining with you."

- m) Barry subsequently filed a Notice of Ceasing to Act and by at least on or about 1 September 2015, Goodwin had retained Julie Holtham of Story and Associates to represent his interests in the proceedings.
- n) On 1 September 2015, Goodwin lodged a complaint against Barry with the LSNT. A complaint was also made against Farmer though that is not material to the matters here in issue. It is clear from Goodwin's complaint that he was far from happy with the valuation evidence.
- o) Ground 1 of that complaint was subsequently distilled by the LSNT and accepted by Goodwin as follows:

"Failure by Mr Barry to dispute the second valuation report obtained by Ms Farmer or to seek additional time after the delivery of this valuation shortly before the conciliation conference."

- p) The Proceedings were heard before Judge Young on 7 and 8 October 2015 and again on 12 February 2016. His Honour delivered judgment on 21 July 2016 and relevantly made orders that the Property be sold and the balance of the purchase price, after satisfaction of the costs of sale and the discharge of securities, be disbursed 58% to the Goodwin and 42% to Hall.
- q) On 7 January 2020, the LSNT dismissed Goodwin's complaint on all grounds and issued written reasons. Relevantly and in respect of Ground 1 the LSNT determined:

"The Society considers that it is not reasonably likely that the Disciplinary Tribunal would be satisfied to the requisite standard that Barry engaged in conduct amounting to unsatisfactory professional conduct or professional misconduct as a result of the decision to not challenge the further valuation obtained by Hall and instead seek to have the valuers agree on a value, or to seek an adjournment of the conciliation conference due to late receipt of the further valuation report from Valuations NT. For this reasons (sic) this ground of the complaint is dismissed."

- 4) It became clear, in the course of Goodwin's oral submissions, that he was seeking not only to overturn the LSNT's findings on Ground 1, but also wanted the tribunal to consider a compensation order in his favour.
- 5) The Tribunal simply does not have the power to make an order under Chapter 4 Part 4.12 of the *Legal Profession Act 2006* (the Act), where its jurisdiction is enlivened only in an appeal under s506.
- 6) The Tribunal's powers in any appeal are proscribed by s511 of the Act, which relevantly provides that the Tribunal must, on hearing the appeal, either:
 - a) affirm the LSNT's decision;
 - b) set aside the decision and direct the LSNT to commence disciplinary proceedings before the Tribunal; or
 - c) set aside the decision and take the action the LSNT could take under s499(2) of the Act.
- 7) As the LSNT's powers under s499(2) do not extend to the making of compensation orders, nor do the Tribunal's. Moreover and while the Tribunal would have the power to consider a compensation order in any proceedings it may order be properly commenced before it further to s511(1)(a)(ii), it obviously cannot have the power to make such an order in the appeals process leading to the commencement of such proceedings. That would put the cart squarely before the horse, in effect allowing for the exercise of a jurisdiction *in potentia*.
- 8) Before the Tribunal can set aside the LSNT's decision, thus enlivening its powers under s511(1)(a)(ii) or (iii), it first needs to be satisfied the decision was in error.¹
- 9) While Goodwin's oral submissions were at times difficult to follow and constituted something of a moveable feast, the consistent thread of his argument was that Barry had failed to prevent reliance on the Valuations NT report and instead proceeded with a joint valuers' conference which, in effect, legitimised that valuation.
- 10) Moreover, this occurred, if Goodwin's evidence is to be accepted, in circumstances:
 - a) where Barry failed to provide any advice to Goodwin as to what opposition might be taken to the Valuations NT report and simply proceeded to agitate for a joint conference; and
 - b) which resulted in the loss of an opportunity to resolve the proceedings at the conciliation conference.
- 11) The gravamen of Goodwin's argument is that Barry was negligent and that negligence was sufficiently egregious to constitute either unsatisfactory professional conduct or professional misconduct.

¹ *CH v Mental Health Review Tribunal & Anor* (2017) 320 FLR 417 at [20] to [26]; *Allesch v Maunz* (2000) 203 CLR 172 at [23] per the plurality; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission & Ors* (2000) 203 CLR 194 at pp203-204 per Gleeson CJ, Gaudron and Hayne JJ.

- 12) When negligent conduct forms the basis for a professional complaint of this sort, what is required is something more than "*mere negligence*". The negligence must be sufficiently egregious in nature and/or demonstrated consistently over a range of matters before it can be considered sufficiently damning to merit a "*black mark*" against the practitioner's name. See *Spero Pitsikas* (1995) 1 LPDR (No 1) 5; *Law Society of NSW v Webb* [2012] NSWADT 114;² *Margiotta v Law Society of NSW (No 2)* [2007] NSWADT 65 and *Council of NSW Bar Association v Asuzu* [2011] NSWADT 209.
- 13) There is a paucity of evidence before the Tribunal as to what advice was given in respect of the Valuations NT report. There is, however, evidence from Barry as to what ordinarily happens in proceedings before the Federal Circuit Court where a party seeks to rely on a valuation or report provided other than in accordance with extant orders or directions.
- 14) The contemporaneous documentary evidence weighs against Goodwin. He clearly contacted the author of the McGees report, was clearly advised that the appropriate way to deal with the Valuations NT report was to arrange a joint conference and then contacted Barry to make the very suggestion of which he now seeks to complain.
- 15) Even assuming Barry had advised Goodwin to force Hall to make formal application for leave to rely on the Valuations NT report, the evidence before the Tribunal is that such leave would likely have been granted, at trial if not before.
- 16) It is difficult to conceive, in the circumstances, how Barry could be said to have been negligent.
- 17) The most damning difficulty facing Goodwin, however, is the absence of any evidence of loss and damage.
- 18) In this regard:
 - a) there is no evidence before the Tribunal that the matter would have settled at the conciliation conference absent the late service of the Valuations NT report;
 - b) nor is there any evidence that either the Court or Hall would have been minded to agree an adjournment of the conciliation conference if one had been sought or that any such adjournment would have resulted in a conciliation conference proceeding, or for that matter settling, were Hall forced to proceed with the same absent the Valuations NT report; and
 - c) most damaging of all, there is simply no evidence before the Tribunal that Goodwin or Kelly could have acquired the Property, even if the parties ultimately agreed and/or the Court ultimately held that the fair market value of the Property was that provided for in the McGees report.
- 19) Negligence does not exist absent loss and damage and the necessity for the same does not disappear merely because the assertion of negligence is made in the context of professional conduct proceedings.

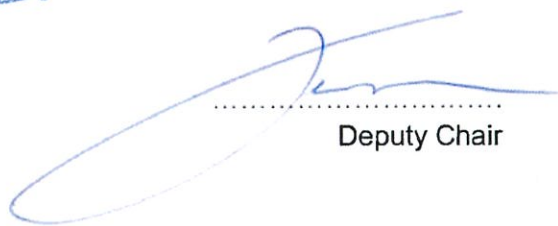
² This matter was subsequently appealed by the NSW Law Society, seeking findings of professional misconduct as opposed to unsatisfactory professional conduct. In that appeal Meagher JA (with whose judgment Leeming and Simpson JJ concurred), neutrally and in *obiter*, references the comments in the decision below referable to *Spero Pitsikas: Council of the Law Society of New South Wales v Webb* [2013] NSWCA 423.

20) There is no basis upon which the Tribunal can do anything other than affirm the LSNT's decision.

21) On hearing, Barry's counsel advised that his client would not be seeking an order for his costs should Goodwin's appeal be dismissed. In the premises and unless the LSNT makes application to be heard further on the question within seven (7) days of the delivery of these reasons, the Tribunal proposes to proceed to order as follows:

- a) the appeal be dismissed;
- b) the LSNT to have its costs of and incidental to the Appeal from the Legal Practitioners Fidelity Fund;
- c) save as aforesaid, the parties bear their own costs of and incidental to the appeal.

Dated: 7 September 2020



.....
Deputy Chair

.....
Legal Member

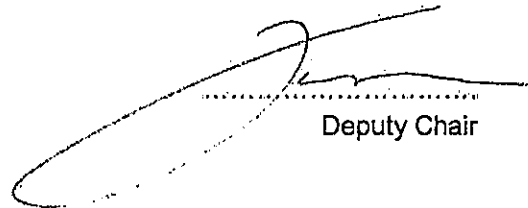
.....
Lay Member

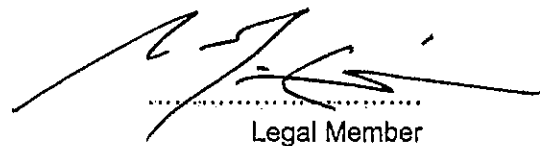
20) There is no basis upon which the Tribunal can do anything other than affirm the LSNT's decision.

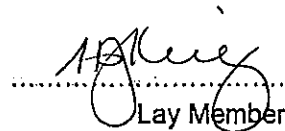
21) On hearing, Barry's counsel advised that his client would not be seeking an order for his costs should Goodwin's appeal be dismissed. In the premises and unless the LSNT makes application to be heard further on the question within seven (7) days of the delivery of these reasons, the Tribunal proposes to proceed to order as follows:

- a) the appeal be dismissed;
- b) the LSNT to have its costs of and incidental to the Appeal from the Legal Practitioners Fidelity Fund;
- c) save as aforesaid, the parties bear their own costs of and incidental to the appeal.

Dated: 7 September 2020


.....
Deputy Chair


.....
Legal Member


.....
Lay Member